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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 EDGAR MEJIA HERNANDEZ,) Case No. SACV 12-2117-PSG (DTB)
12 Petitioner,)
13 vs.) ORDER TO SHOW CAUSE
14 L. S. McEWEN, Warden,)
15 Respondent.)
16

17 On December 6, 2012, petitioner filed a Petition for Writ of Habeas Corpus by
18 a Person in State Custody (“Pet.”) herein. The Petition purports to be directed to a
19 2007 conviction sustained by petitioner in Orange County Superior Court. (See Pet.
20 at ¶¶ 1-2.) Petitioner purports to be raising a single ground for relief. (See Pet. at ¶
21 7a.)

22 Based on its review of the Petition as well as information derived from the
23 California Appellate Courts website¹, it appears to the Court that the Petition is time
24 barred. Accordingly, on or before **January 11, 2013**, petitioner is ORDERED to

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28 ¹ <http://appellatecases.courtinfo.ca.gov/index.html>

1 show cause in writing (if any he has) why the Court should not recommend that this
 2 action be dismissed with prejudice on the ground of untimeliness.²

4 THE TIME BAR ISSUE

5 Since this action was filed after the President signed into law the Antiterrorism
 6 and Effective Death Penalty Act of 1996 (the “AEDPA”) on April 24, 1996, it is
 7 subject to the AEDPA’s one-year limitation period, as set forth at 28 U.S.C. §
 8 2244(d). See Calderon v. United States District Court for the Central District of
 9 California (Beeler), 128 F.3d 1283, 1287 n.3 (9th Cir. 1997).³ 28 U.S.C. § 2244(d)
 10 provides:

11 “(1) A 1-year period of limitation shall apply to an application for
 12 a writ of habeas corpus by a person in custody pursuant to the judgment
 13 of a State court. The limitation period shall run from the latest of--

14 (A) the date on which the judgment became final by
 15 conclusion of direct review or the expiration of the time for
 16 seeking such review;

17 (B) the date on which the impediment to filing an
 18 application created by State action in violation of the Constitution
 19 or laws of the United States is removed, if the applicant was
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21 ² The Ninth Circuit has held that the district court has the authority to raise
 22 the statute of limitations issue *sua sponte* when untimeliness is obvious on the face of
 23 the petition and to summarily dismiss a petition on that ground pursuant to Rule 4 of
 24 the Rules Governing Section 2254 Cases in the United States District Courts, so long
 25 as the court “provides the petitioner with adequate notice and an opportunity to
 26 respond.” See Nardi v. Stewart, 354 F.3d 1134, 1141 (9th Cir. 2004); Herbst v. Cook,
 260 F.3d 1039, 1042-43 (9th Cir. 2001).

27 ³ Beeler was overruled on other grounds in Calderon v. United States
 28 District Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

1 prevented from filing by such State action;

2 (C) the date on which the constitutional right asserted was
3 initially recognized by the Supreme Court, if the right has been
4 newly recognized by the Supreme Court and made retroactively
5 applicable to cases on collateral review; or

6 (D) the date on which the factual predicate of the claim or
7 claims presented could have been discovered through the exercise
8 of due diligence.”
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10 From a review of the Petition, as well as the California Appellate Courts website,
11 it appears that petitioner appealed the underlying judgment of conviction to the
12 California Court of Appeal, which subsequently affirmed the judgment on June 11,
13 2008. Thereafter, petitioner filed a Petition for Review in the California Supreme Court
14 on or about June 30, 2008 which was subsequently denied on August 20, 2008. Thus,
15 “the date on which the judgment became final by conclusion of direct review or the
16 expiration of the time for seeking such review” was November 18, 2008, when the 90-
17 day period for petitioner to petition the United States Supreme Court for a writ of
18 certiorari expired. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999); Beeler,
19 128 F.3d at 1286 n.2. Therefore, for purposes of 28 U.S.C. § 2244(d)(1)(A),
20 petitioner’s judgment of conviction “became final by conclusion of direct review or
21 the expiration of the time for seeking such review” on November 18, 2008, and his
22 one-year limitations period under the AEDPA expired on November 18, 2009, absent
23 either a late-trigger date or a basis for tolling of the statute.

24 From the face of the Petition, it does not appear that petitioner has any basis for
25 contending that he is entitled to a later trigger date under § 2244(d)(1)(B). Nor does it
26 appear that petitioner has a basis for contending that any of his claims is based on a
27 federal constitutional right that was initially recognized by the United States Supreme
28 Court subsequent to the date of his conviction became final and that has been made

1 retroactively applicable to cases on collateral review, as provided in § 2244(1)(C).
2 Finally, it appears that petitioner has no basis for contending that he is entitled to a later
3 trigger date under § 2244(d)(1)(D) since petitioner was aware of the **factual** predicate
4 of his claim as of the date his petition for review was denied. See Hasan v. Galaza,
5 254 F.3d 1150, 1154 n.3 (9th Cir. 2001) (statute of limitations begins to run when a
6 prisoner “knows (or through diligence could discover) the important facts, not when
7 the prisoner recognizes their legal significance”).

8 Thus, unless a basis for tolling the statute existed, petitioner’s last day to file his
9 federal habeas petition was November 18, 2009. See Patterson v. Stewart, 251 F.3d
10 1243, 1246 (9th Cir. 2001); Beeler, 128 F.3d at 1287-88.

11 28 U.S.C. § 2244(d)(2) provides:

12 “The time during which a properly filed application for State post-
13 conviction or other collateral review with respect to the pertinent
14 judgment or claim is pending shall not be counted toward any period of
15 limitation under this subsection.”
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17 In Nino v. Galaza, 183 F.3d 1003 (9th Cir. 1999), the Ninth Circuit construed
18 the foregoing tolling provision with reference to California’s post-conviction
19 procedures. The Ninth Circuit held that “the statute of limitations is tolled from the
20 time the first state habeas petition is filed until the California Supreme Court rejects the
21 petitioner’s final collateral challenge.” See id. at 1006. Accord, Carey v. Saffold, 536
22 U.S. 214, 219-21, 122 S. Ct. 2134, 153 L. Ed. 2d 260 (2002) (holding that, for
23 purposes of statutory tolling, a California petitioner’s application for collateral review
24 remains “pending” during the intervals between the time a lower state court denies the
25 application and the time the petitioner files a further petition in a higher state

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28 court). However, the statute of limitations is not tolled during the interval between the

1 date on which the judgment of conviction became final and the filing of the petitioner's
2 first collateral challenge. See Nino, 183 F.3d at 1006.

3 Petitioner's Petition for Review to the California Supreme Court was denied
4 August 20, 2008, and his conviction became final 90 days later, on November 18,
5 2008. There is no record of petitioner filing any state habeas petition during the
6 approximately 4 year period between the denial of his Petition for Review and the filing
7 his federal habeas petition, even though petitioner marks "yes" to the question "[h]ave
8 you previously filed any habeas petitions in any state court with respect to this
9 judgment of conviction." (See Pet. ¶ 6.) Once the AEDPA limitations period lapsed
10 in November 2009, it could not be reinitiated. See Ferguson v. Palmateer, 321 F.3d
11 820, 823 (9th Cir. 2003) (holding that § 2244(d) "does not permit the reinitiation of the
12 limitations period that has ended before the state petition was filed," even if the state
13 petition was timely filed); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001); Wixom
14 v. Washington, 264 F.3d 894, 898-99 (9th Cir. 2001); Green v. White, 223 F.3d 1001,
15 1003 (9th Cir. 2000). Thus, it appears there is no basis for statutory tolling of the
16 limitations period with respect to the Petition.

17 In Holland v. Florida, —U.S.—, 130 S. Ct. 2549 (2010), the Supreme Court held
18 that the timely filing of a habeas petition was not jurisdictional, but rather was subject
19 to equitable tolling. If petitioner intends to rely on the equitable tolling doctrine for
20 purposes of arguing that his federal habeas petition is timely, he will need to include
21 with his Response to this Order to Show Cause a declaration under penalty of perjury
22 stating facts showing (1) that he has been pursuing hi rights diligently, and (2) that
23 some "extraordinary circumstances" beyond petitioner's control stood in his way

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28 and/or made it impossible for him to file the Petition on time. See Pace v.

1 DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005); see also
2 Roy v. Lampert, 465 F.3d 964, 969 (9th Cir. 2006); Raspberry v. Garcia, 448 F.3d
3 1150, 1153 (9th Cir. 2006).

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5 DATED: December 17, 2012



8 DAVID T. BRISTOW
9 UNITED STATES MAGISTRATE JUDGE
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